IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 802 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE H.B.ANTANI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

AYUBKHAN MOHAMMED RAFIK PATHAN - Appellant(s)
Versus
THE STATE OF GUJARAT - Opponent(s)

==========

Appearance :
MR HASHIM QURESHI for Appellant(s) : 1,
MR LR PUJARI Ld. APP for Opponent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 24/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. The present appeal is preferred under sec. 34 of the Prevention of Terrorism Act (Hereinafter referred to as “the POTA” for short) and directed against the order passed in Criminal Misc. Application No. 3794 of 2004 by the ld. Special Judge (POTA), by which, the application for regular bail was rejected. The appellant preferred the application for his enlargement on bail in connection with First CR No. I-6/2003 registered with the DCB Police Station, for the offences punishable under sec. 120B, 121, 121A, 122, 123 of the IPC and sec. 3(1)a,b, sec. 3(3), 4, 20, 21(2)(b), 22(2) of POTA, sec. 25(1)b,c, 27 and 29 of the Arms Act, which was subsequently given number as Special POTA Case No. 12/2003.

2. Ld. Advocate representing the appellant submitted that the order passed by the ld. Special Judge is not based on material or evidence on record of the case and, therefore, it deserves to be set aside and the appellant be enlarged on regular bail. The provision contained in sec. 3(3) of the POTA was misconstrued by the ld. Special Judge in holding that prima-facie the prosecution has indicated the involvement of the appellant in the commission of the offences. The Ld. Special Judge ought to have taken into consideration the statement recorded of Accused No. B-30 and B-33 in proper perspective while

considering the bail application preferred by the appellant. The appellant is alleged to have supplied the Arms and Ammunition for which the statement recorded under sec. 32 of the POTA Act is relied upon, but in view of the recent judgment rendered by the Apex Court in **State (NCT) of Delhi Vs. Navjot Sandhu and reported in (2005)11 SCC 600,** the statement which is recorded under sec. 32 of the POTA Act cannot be solely relied upon to reject the bail application of the appellant. The appellant was in no way involved with the commission of the offences and, therefore, he be enlarged on regular bail. It is submitted that even the salient features of sec. 32 of the POTA more particularly sub-sec.(4) and (5) were not complied with while recording the confessional statement. No acknowledgment in writing was communicated and same was not appended to the confessional statement recoded under sec. 32 of the Act. However, the role of appellant as intermediary in supplying the arms and ammunition between his father-in-law and Mufti Sufiyan has not been prima-facie established and, therefore, the appellant is liable to be enlarged on bail as prayed for in the

application. On overall perusal of the material on record, no overt act can be said to have been established against the appellant and, therefore, the appellant is entitled to be enlarged on regular bail. The contradictory nature of the version given by the prosecution also requires to be taken into consideration. The story as per the prosecution case was to the effect that the appellant was arrested from the Railway Station, while, the confessional statement given by one Latifkhan and Mohmad Sadik, makes it clear that they were returning from Kashmir by a truck carrying some weapons. In view of the contradictory version of the prosecution story, the doubt is created and, therefore, the appellant, on that very ground requires to be enlarged on bail. Thus, the ld. Advocate for the appellant submitted that as the appellant has made out a case for the grant of bail, he be released on regular bail on the terms and conditions which this Court may deem fit to impose upon him.

3. As against the above mentioned submissions, ld. APP Mr. Pujari vehemently submitted that the role played by the appellant as intermediary in supplying

the arms and ammunition between his father-in-law and Mufti Sufiyan cannot be said to be insignificant. The statement of Kashmiri Lal shows as to how the appellant was involved in the commission of offence. The panchnama also prima facie indicates the involvement of appellant in the commission of offence. The statement recorded of two witnesses B-30 and B-33 indicate the involvement of the appellant in commission of offence. However, the ld. APP submitted that the Ld. Special Judge has also carefully taken into consideration the fact that there was a joint meetting of Mufti Sufiyan with the Father-in-law of the present appellant and that fact has been amply reflected in the statement of witnesses No. B-30 and B-33. Thus, considering the role played by the appellant and his prima-facie involvement in the commission of crime, the ld. Special Judge has rightly rejected the bail application preferred by the appellant and, there is no reason to interfere with the order passed by the ld. Special Judge. As the ld. Advocate for the appellant has not even made out a case for the enlargement of the appellant on regular bail, the appeal preferred by the appellant

is without any merits and the same deserves to be dismissed.

4. Taking into consideration the rival submissions and on perusal of the material placed before this court as well as the order passed by the ld. Special Judge (POTA) in Criminal Misc. Application No. 3794/2004, this court is of the view that appellant cannot be enlarged on bail for the following reasons.

5. The appellant has been charged for the offences punishable under sec. 120B, 121, 121A, 122, 123 of the IPC and sec. 3(1)a,b, sec. 3(3), 4, 20, 21(2)(b), 22(2) of POTA, sec. 25(1)b,c, 27 and 29 of the Arms Act. The appellant was found with 8 cartridges when he was about to flee from Ahmedabad to Ajmer. The confessional statement of Abdul @ Kashmiri Lala Pathan father-in-law of the appellant speaks about the alleged role of the appellant. The statement of co-accused Haji Mohmad Sadik Mahmad as well as Gulam both prima facie indicate the involvement of the appellant in the offence. On perusal of the statements of witnesses No. B-30 and B-33, it reflects the meeting between father-in-law

of the appellant with Mufti Sufiyan the absconding accused who is the main accused in the alleged conspiracy. This speaks volumes about the prima-facie involvement of the appellant in the alleged conspiracy with other accused. The fact that the appellant was involved in a criminal conspiracy under sec, 120B of IPC and further fact that the provisions of POTA were invoked against the appellant cannot be overlooked by this Court. As the appellant has completed more than one year in judicial custody, the rigours of sub-section (6) & (7) of POTA would not apply in the present case but the application for bail can be considered under sec. 439 of CrPC along with provisions of POTA.

6. We have carefully perused the statements which are relied upon by the ld. Advocate of both the sides and also considered the gravity of the offence, nature of the involvement of the appellant and the role attributed to the appellant in the commission of the crime and the sentence which is likely to be imposed on the appellant if convicted.

7. In view of the aforesaid fact and circumstances, we are of the opinion that it is not a fit case to enlarge the appellant on regular bail. Hence, we pass the following order:

8. The appeal fails and it is dismissed.

(A.R. DAVE, J.)

(H.B. ANTANI, J.)

mandora/